

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 94-78
Table of Allotments)	RM-8472
FM Broadcast Stations)	RM-8525
(Cloverdale, Montgomery)	
and Warrior, Alabama))	

TO: Chief, Allocations Branch
Mass Media Bureau

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REPLY TO OPPOSITION TO
"MOTION FOR A WAIVER OF AUTOMATIC STAY"

North Jefferson Broadcasting Company, Inc. ("WLBI"), licensee of Station WLBI(FM), Warrior, Alabama, and Deep South Broadcasting Company ("WBAM"), licensee of Station WBAM-FM, Montgomery (jointly as "WLBI/WBAM"), by their counsel, hereby submit a reply to the opposition of William P. Rogers ("Rogers") to the "Motion for a Waiver of Automatic Stay" filed by WLBI/WBAM. In support hereof, WLBI/WBAM state as follows:

1. WLBI's proposal to upgrade its station on Channel 254C1 and WBAM's proposal to downgrade its station on Channel 255C1 were granted by Report and Order, released December 11, 1995, DA 95-2413. William Rogers had filed a conflicting proposal to allot Channel 254A to Florence, Alabama. Rogers' proposal was not

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accepted and due to a lack of principal community coverage remains technically deficient. Nevertheless, in its petition for reconsideration Rogers argues that the Commission should overlook the deficiency and allot the channel to Florence.

2. WLBI/WBAM believe that the Commission should allow them to file their applications for Class C1 facilities at their own risk. Had WLBI and WBAM been permitted to file Form 301 applications for a one-step upgrade (or downgrade), instead of having first filed a rule making proposal, the filing of a petition for reconsideration by another party would not invoke the automatic stay provision of Section 1.420(f). The Commission has come to recognize this inconsistency with respect to rule making and application processes and has proposed generically to eliminate the automatic stay rule and allow licensees to take the risk of an adverse decision on reconsideration or review. See Notice of Proposed Rule Making in Amendment of Section 1.420(f) of the Commission's Rules Covering Automatic Stay of Certain Allocation Orders, 10 FCC Rcd 7753 (1995). Unfortunately the rule is still in effect for this proceeding and bars the filing of an application by WLBI and WBAM.

3. WLBI/WBAM are willing to take the risk here because they believe that the Commission will not approve an admittedly substandard allotment. The Commission has consistently opposed such attempts in rule making proceedings and has not allotted new channels that do not meet spacing or principal community coverage

requirements. In this regard, the Commission recently took the opportunity in the aforementioned "one-step" application proceeding to insist that all applications for upgrades demonstrate that the Commission's spacing and principal community coverage requirements are met from a theoretical reference point even though the proposed transmitter site is short-spaced or covers less than 100% of the community. Amendment of the Commission's Rules to Permit FM Channel and Class Modification by Application, 8 FCC Rcd 4735 (1993). In that proceeding, the Commission stated, at p. 4737:

"We conclude that it is in the public interest to preserve the benefits of the current system by preventing the allotment of channels that would not meet our present allotment standards. The preservation of those allotment standards is necessary to prevent overcrowding and to promote a more even distribution of stations."

Thus the Commission's primary concern is to maintain and protect the integrity of its core allotment policy objectives, i.e., principal community coverage and adequate spacing between stations.

4. In his opposition, Rogers argues that he believes he can still succeed on the merits of his proposal for Channel 254A at Florence. Rogers also believes that, by allowing WLBI/WBAM to construct, the Commission's ultimate determination will be prejudiced.

5. WLBI/WBAM has already stated its position with respect to the merits of allotting Channel 254A to Florence. The proposal was admittedly technically deficient when filed even placed in its most favorable light with enhanced terrain propagation. (The actual

deficiency may be well below 80%.) By even considering this proposal, the Commission is placed in a position of approving an allotment whose best theoretical site is still deficient. The actual sites selected will likely either be further deficient or short spaced with contour protection and thereby add to the congestion of the FM band. This congestion is exactly what the Commission stated that it wanted to avoid. "It was not our intention ... to provide a means for exacerbating that congestion. Therefore, we believe that the limits we impose on the use of the one-step process are necessary to preserve our core allotment policies, and we would not adopt the new process [one-step upgrade] in the absence of these or similar limits." Id. at p. 4738.

6. As for the prejudice that Rogers believes will ensue by grant and construction of a C1 facility, the Commission allows applicants to construct other types of minor changes despite a petition for reconsideration. The Commission also allows parties to a transaction to consummate and take control of a station despite a petition for reconsideration. Apparently, the Commission is not prejudiced by such actions in those cases.

7. If the Commission believes that the merits of Rogers' proposal or the prejudice that might ensue warrant imposing a stay, then the Commission is free to do so. But the Commission should not allow a stay to be automatically imposed where, as here, the successful proponents are willing to take the risk.

8. Accordingly, WLBI/WBAM urge the Commission expeditiously to remove the automatic stay imposed in this case and allow the filing of applications for Class C1 facilities.

Respectfully submitted,

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March 7, 1996

CERTIFICATE OF SERVICE

I, Joan M. Trepal, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, P.C., do hereby certify that on this 7th day of March, 1996, copies of the foregoing "Reply to Opposition to 'Motion For a Waiver of Automatic Stay'" were sent by first class United States mail, postage prepaid, to the following:

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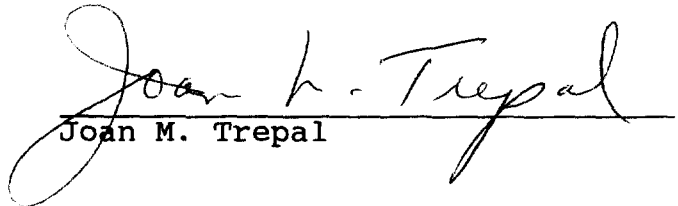
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